

Subpart H—Access to Criminal History Record Information

CHAPTER 91—ACCESS TO CRIMINAL HISTORY RECORDS FOR NATIONAL SECURITY AND OTHER PURPOSES

Sec.

9101. Access to criminal history records for national security and other purposes.

Editorial Notes

AMENDMENTS

2000—Pub. L. 106-398, §1 [[div. A], title X, §1076(f)(1)(A), (2)(B)], Oct. 30, 2000, 114 Stat. 1654, 1654A-282, substituted “AND OTHER PURPOSES” for “PURPOSES” in chapter heading and “Access to criminal history records for national security and other purposes” for “Criminal history record information for national security purposes” in item 9101.

§ 9101. Access to criminal history records for national security and other purposes

(a) As used in this section:

(1) The term “criminal justice agency” means (A) any Federal, State, or local court, and (B) any Federal, State, or local agency, or any subunit thereof, which performs the administration of criminal justice pursuant to a statute or Executive order, and which allocates a substantial part of its annual budget to the administration of criminal justice.

(2) The term “criminal history record information” means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correction supervision, and release. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system. The term includes those records of a State or locality sealed pursuant to law if such records are accessible by State and local criminal justice agencies for the purpose of conducting background checks.

(3) The term “classified information” means information or material designated pursuant to the provisions of a statute or Executive order as requiring protection against unauthorized disclosure for reasons of national security.

(4) The term “State” means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, and any other territory or possession of the United States.

(5) The term “local” and “locality” means any local government authority or agency or component thereof within a State having jurisdiction over matters at a county, municipal, or other local government level.

(6) The term “covered agency” means any of the following:

- (A) The Department of Defense.
- (B) The Department of State.

(C) The Department of Transportation.

(D) The Office of Personnel Management.

(E) The Central Intelligence Agency.

(F) The Federal Bureau of Investigation.

(G) The Department of Homeland Security.

(H) The Office of the Director of National Intelligence.

(I) An Executive agency that—

- (i) is authorized to conduct background investigations under a Federal statute; or
- (ii) is delegated authority to conduct background investigations in accordance with procedures established by the Security Executive Agent or the Suitability Executive Agent under subsection (b) or (c)(iv) of section 2.3 of Executive Order 13467 (73 Fed. Reg. 38103), or any successor thereto.

(J) A contractor that conducts a background investigation on behalf of an agency described in subparagraphs (A) through (I).

(7) The terms “Security Executive Agent” and “Suitability Executive Agent” mean the Security Executive Agent and the Suitability Executive Agent, respectively, established under Executive Order 13467 (73 Fed. Reg. 38103), or any successor thereto.

(b)(1) Upon request by a covered agency, criminal justice agencies shall make available all criminal history record information regarding individuals under investigation by that covered agency, in accordance with Federal Investigative Standards jointly promulgated by the Suitability Executive Agent and Security Executive Agent, for the purpose of—

(A) determining eligibility for—

- (i) access to classified information;
- (ii) assignment to or retention in sensitive national security duties or positions;
- (iii) acceptance or retention in the armed forces; or
- (iv) appointment, retention, or assignment to a position of public trust while either employed by the Government or performing a Government contract; or

(B) conducting a basic suitability or fitness assessment for Federal or contractor employees, using Federal Investigative Standards jointly promulgated by the Security Executive Agent and the Suitability Executive Agent in accordance with—

- (i) Executive Order 13467 (73 Fed. Reg. 38103), or any successor thereto; and
- (ii) the Office of Management and Budget Memorandum “Assignment of Functions Relating to Coverage of Contractor Employee Fitness in the Federal Investigative Standards”, dated December 6, 2012;

(C) credentialing under the Homeland Security Presidential Directive 12 (dated August 27, 2004); and

(D) Federal Aviation Administration checks required under—

- (i) the Federal Aviation Administration Drug Enforcement Assistance Act of 1988 (subtitle E of title VII of Public Law 100-690; 102 Stat. 4424) and the amendments made by that Act; or

(ii) section 44710 of title 49.

(2)(A) A State central criminal history record depository shall allow a covered agency to conduct both biometric and biographic searches of criminal history record information.

(B) Nothing in subparagraph (A) shall be construed to prohibit the Federal Bureau of Investigation from requiring a request for criminal history record information to be accompanied by the fingerprints of the individual who is the subject of the request.

(3) Fees, if any, charged for providing criminal history record information pursuant to this subsection shall not exceed the reasonable cost of providing such information.

(4) This subsection shall apply notwithstanding any other provision of law or regulation of any State or of any locality within a State, or any other law of the United States.

(c) A covered agency shall not obtain criminal history record information pursuant to this section unless it has received written consent from the individual under investigation for the release of such information for the purposes set forth in paragraph (b)(1).

(d) Criminal history record information received under this section shall be disclosed or used only for the purposes set forth in paragraph (b)(1) or for national security or criminal justice purposes authorized by law, and such information shall be made available to the individual who is the subject of such information upon request.

(e)(1) Automated information delivery systems shall be used to provide criminal history record information to a covered agency under subsection (b) whenever available.

(2) Fees, if any, charged for automated access through such systems may not exceed the reasonable cost of providing such access.

(3) The criminal justice agency providing the criminal history record information through such systems may not limit disclosure on the basis that the repository is accessed from outside the State.

(4) Information provided through such systems shall be the full and complete criminal history record.

(5) Criminal justice agencies shall accept and respond to requests for criminal history record information through such systems with printed or photocopied records when requested.

(6) If a criminal justice agency is able to provide the same information through more than 1 system described in paragraph (1), a covered agency may request information under subsection (b) from the criminal justice agency, and require the criminal justice agency to provide the information, using the system that is most cost-effective for the Federal Government.

(f) The authority provided under this section with respect to the Department of State may be exercised only so long as the Department of State continues to extend to its employees and applicants for employment, at a minimum, those procedural safeguards provided for as part of the security clearance process that were made available, as of May 1, 1987, pursuant to section 163.4 of volume 3 of the Foreign Affairs Manual.

(g) Upon request by a covered agency and in accordance with the applicable provisions of this

section, the Deputy Assistant Secretary of State for Overseas Citizens Services shall make available criminal history record information collected by the Deputy Assistant Secretary with respect to an individual who is under investigation by the covered agency regarding any interaction of the individual with a law enforcement agency or intelligence agency of a foreign country.

(h) If a contractor described in subsection (a)(6)(J) uses an automated information delivery system to request criminal history record information, the contractor shall comply with any necessary security requirements for access to that system.

(i) The Suitability and Security Clearance Performance Accountability Council established under Executive Order 13467 (73 Fed. Reg. 38103), or any successor thereto, shall submit to the Committee on Armed Services, the Committee on Homeland Security and Governmental Affairs, the Committee on Appropriations, and the Select Committee on Intelligence of the Senate, and the Committee on Armed Services, the Committee on Oversight and Government Reform, the Committee on Appropriations, and the Permanent Select Committee on Intelligence of the House of Representatives, an annual report that—

(1) describes efforts of the Council to integrate Federal, State, and local systems for sharing criminal history record information;

(2) analyzes the extent and effectiveness of Federal education programs regarding criminal history record information;

(3) provides an update on the implementation of best practices for sharing criminal history record information, including ongoing limitations experienced by investigators working for or on behalf of a covered agency with respect to access to State and local criminal history record information; and

(4) provides a description of limitations on the sharing of information relevant to a background investigation, other than criminal history record information, between—

(A) investigators working for or on behalf of a covered agency; and

(B) State and local law enforcement agencies.

(Added Pub. L. 99-169, title VIII, § 801(a), Dec. 4, 1985, 99 Stat. 1009; amended Pub. L. 99-569, title IV, § 402(a), Oct. 27, 1986, 100 Stat. 3196; Pub. L. 101-246, title I, § 114, Feb. 16, 1990, 104 Stat. 22; Pub. L. 106-398, § 1 [[div. A], title X, § 1076(a)–(e), (f)(2)(A)], Oct. 30, 2000, 114 Stat. 1654, 1654A–280 to 1654A–282; Pub. L. 114-92, div. A, title X, § 1086(f)(1)–(6)(A), (7), (8), (10), Nov. 25, 2015, 129 Stat. 1008–1011.)

Editorial Notes

REFERENCES IN TEXT

Executive Order 13467, referred to in subsecs. (a)(6)(I)(ii), (7), (b)(1)(B)(i), and (i), is Ex. Ord. No. 13467, June 30, 2008, 73 F.R. 38103, which is set out as a note under section 3161 of Title 50, War and National Defense.

Federal Aviation Administration Drug Enforcement Assistance Act of 1988, referred to in subsec. (b)(1)(D)(i), is subtitle E (§§ 7201 to 7214) of Pub. L. 100-690, title VII,

Nov. 18, 1988, 102 Stat. 4424. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2015—Subsec. (a)(2). Pub. L. 114-92, §1086(f)(6)(A), substituted “The term includes those records of a State or locality sealed pursuant to law if such records are accessible by State and local criminal justice agencies for the purpose of conducting background checks.” for “The term does not include those records of a State or locality sealed pursuant to law from access by State and local criminal justice agencies of that State or locality.”

Subsec. (a)(6)(G) to (J). Pub. L. 114-92, §1086(f)(2), added subpars. (G) to (J).

Subsec. (a)(7). Pub. L. 114-92, §1086(f)(1), added par. (7).

Subsec. (b)(1). Pub. L. 114-92, §1086(f)(3)(B), in introductory provisions, struck out “the head of” before “a covered agency”, inserted “all” before “criminal history record information”, and substituted “, in accordance with Federal Investigative Standards jointly promulgated by the Suitability Executive Agent and Security Executive Agent, for the purpose of—” for “for the purpose of determining eligibility for any of the following:”.

Subsec. (b)(1)(A). Pub. L. 114-92, §1086(f)(3)(A), (B)(iii), (C)-(F), inserted “(A) determining eligibility for—”; redesignated former subpars. (A) to (D) as cls. (i) to (iv), respectively, of subpar. (A) and realigned margins; in cl. (i), substituted “access” for “Access” and semicolon for period at end; in cl. (ii), substituted “assignment” for “Assignment” and “or positions;” for period at end; in cl. (iii), substituted “acceptance” for “Acceptance” and “; or” for period at end; and in cl. (iv), substituted “appointment” for “Appointment” and “; or” for period at end and struck out “or a critical or sensitive position” after “public trust”.

Subsec. (b)(1)(B) to (D). Pub. L. 114-92, §1086(f)(3)(G), added subpars. (B) to (D). Former subpars. (B) to (D) redesignated cls. (ii) to (iv), respectively, of subpar. (A).

Subsec. (b)(2). Pub. L. 114-92, §1086(f)(4), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “Such a request to a State central criminal history record repository shall be accompanied by the fingerprints of the individual who is the subject of the request if required by State law and if the repository uses the fingerprints in an automated fingerprint identification system.”

Subsec. (e)(6). Pub. L. 114-92, §1086(f)(5), added par. (6).

Subsec. (g). Pub. L. 114-92, §1086(f)(7), added subsec. (g).

Subsec. (h). Pub. L. 114-92, §1086(f)(8), added subsec. (h).

Subsec. (i). Pub. L. 114-92, §1086(f)(10), added subsec. (i).

2000—Pub. L. 106-398, §1 [[div. A], title X, §1076(f)(2)(A)], substituted “Access to criminal history records for national security and other purposes” for “Criminal history record information for national security purposes” in section catchline.

Subsec. (a)(1). Pub. L. 106-398, §1 [[div. A], title X, §1076(e)(1)], substituted “means (A) any Federal, State, or local court, and (B) any Federal, State, or local agency, or any subunit thereof, which” for “includes Federal, State, and local agencies and means: (A) courts, or (B) a Government agency or any subunit thereof which”.

Subsec. (a)(4). Pub. L. 106-398, §1 [[div. A], title X, §1076(e)(2)], inserted “the Commonwealth of” before “the Northern Mariana Islands” and struck out “the Trust Territory of the Pacific Islands,” after “American Samoa,”.

Subsec. (a)(6). Pub. L. 106-398, §1 [[div. A], title X, §1076(a)(1)], added par. (6).

Subsec. (b). Pub. L. 106-398, §1 [[div. A], title X, §1076(c)], in first sentence of par. (1), inserted “any of the following:” after “eligibility for” and substituted subpars. (A) to (D) for “(A) access to classified information or (B) assignment to or retention in sensitive na-

tional security duties.”, designated second sentence of par. (1) as par. (2), designated third sentence of par. (1) as par. (3) and substituted a period for “, nor shall they in any event exceed those charged to State or local agencies other than criminal justice agencies for such information.”, and redesignated former par. (2) as (4).

Subsec. (b)(1). Pub. L. 106-398, §1 [[div. A], title X, §1076(a)(2)], substituted “by the head of a covered agency” for “by the Department of Defense, the Department of State, the Office of Personnel Management, the Central Intelligence Agency, or the Federal Bureau of Investigation” and “that covered agency” for “such department, office, agency, or bureau”.

Subsec. (b)(3). Pub. L. 106-398, §1 [[div. A], title X, §1076(b)], struck out par. (3) which related to agreements between Federal departments and agencies and States and localities to indemnify and hold harmless the States and localities from claims arising from the disclosure or use of criminal history record information.

Subsec. (c). Pub. L. 106-398, §1 [[div. A], title X, §1076(a)(3)], substituted “A covered agency” for “The Department of Defense, the Department of State, the Office of Personnel Management, the Central Intelligence Agency, or the Federal Bureau of Investigation”.

Subsecs. (e), (f). Pub. L. 106-398, §1 [[div. A], title X, §1076(d)], added subsec. (e) and redesignated former subsec. (e) as (f).

1990—Subsecs. (b)(1), (3)(A), (B), (c). Pub. L. 101-246, §114(1), inserted “the Department of State,” after “Defense,” wherever appearing.

Subsec. (e). Pub. L. 101-246, §114(2), added subsec. (e).

1986—Subsecs. (b)(1), (3), (c). Pub. L. 99-569 inserted references to the Federal Bureau of Investigation and such bureau.

Statutory Notes and Related Subsidiaries

CHANGE OF NAME

Committee on Oversight and Government Reform of House of Representatives changed to Committee on Oversight and Reform of House of Representatives by House Resolution No. 6, One Hundred Sixteenth Congress, Jan. 9, 2019.

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99-569, title IV, §402(c), Oct. 27, 1986, 100 Stat. 3196, provided that: “The amendments made by this section [amending this section and provisions set out as a note under this section] shall become effective with respect to any inquiry which begins after the date of enactment of this Act [Oct. 27, 1986] conducted by the Federal Bureau of Investigation for purposes specified in paragraph (b)(1) of section 9101 of title 5, United States Code.”

EFFECTIVE DATE

Pub. L. 99-169, title VIII, §802, Dec. 4, 1985, 99 Stat. 1010, provided that: “The amendments made by section 801(a) of this Act [enacting this section] shall become effective with respect to any inquiry which begins after the date of enactment of this Act [Dec. 4, 1985] conducted by the Department of Defense, the Office of Personnel Management, or the Central Intelligence Agency, for the purposes specified in paragraph (b)(1) of section 9101 of title 5, United States Code, as added by this Act.”

TERMINATION DATE OF SUBSECTION (b)(3) OF THIS SECTION

Pub. L. 100-453, title I, §101(d), Sept. 29, 1988, 102 Stat. 1904, extended the expiration date provided in section 803(b) of Pub. L. 99-169, formerly set out below, until Dec. 31, 1989.

Pub. L. 99-169, title VIII, §803(b), Dec. 4, 1985, 99 Stat. 1011, provided that subsec. (b)(3) of this section expired three years after Dec. 4, 1985.

REPORT TO CONGRESSIONAL COMMITTEES ON EFFECT OF
PROVISIONS FOR INDEMNIFICATION AGREEMENTS

Pub. L. 99-169, title VIII, § 803(a), Dec. 4, 1985, 99 Stat. 1010, as amended by Pub. L. 99-569, title IV, § 402(b), Oct. 27, 1986, 100 Stat. 3196, directed Department of Justice, within two years after Dec. 4, 1985, and after consultation with Department of Defense, Office of Personnel Management, Central Intelligence Agency, and Federal Bureau of Investigation, to report to appropriate committees of Congress concerning the effect of 5 U.S.C. 9101(b)(3), as added by this Act, including the effect of the absence of indemnification agreements upon States and localities not eligible under 5 U.S.C. 9101(b)(3) for such agreements.

**CHAPTER 92—PROHIBITION ON CRIMINAL
HISTORY INQUIRIES PRIOR TO CONDI-
TIONAL OFFER**

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§ 9201. Definitions

In this chapter—

(1) the term “agency” means “Executive agency” as such term is defined in section 105 and includes—

- (A) the United States Postal Service and the Postal Regulatory Commission; and
- (B) the Executive Office of the President;

(2) the term “appointing authority” means an employee in the executive branch of the Government of the United States that has authority to make appointments to positions in the civil service;

(3) the term “conditional offer” means an offer of employment in a position in the civil service that is conditioned upon the results of a criminal history inquiry;

(4) the term “criminal history record information”—

(A) except as provided in subparagraphs (B) and (C), has the meaning given the term in section 9101(a);

(B) includes any information described in the first sentence of section 9101(a)(2) that has been sealed or expunged pursuant to law; and

(C) includes information collected by a criminal justice agency, relating to an act or alleged act of juvenile delinquency, that is analogous to criminal history record information (including such information that has been sealed or expunged pursuant to law); and

(5) the term “suspension” has the meaning given the term in section 7501.

(Added Pub. L. 116-92, div. A, title XI, § 1122(a), Dec. 20, 2019, 133 Stat. 1605.)

Statutory Notes and Related Subsidiaries

REGULATIONS

Pub. L. 116-92, div. A, title XI, § 1122(b)(1), Dec. 20, 2019, 133 Stat. 1607, provided that: “Not later than 1 year after the date of enactment of this subtitle [sub-

title A of title XI of div. A of Pub. L. 116-92, approved Dec. 20, 2019], the Director of the Office of Personnel Management shall issue such regulations as are necessary to carry out chapter 92 of title 5, United States Code (as added by this subtitle).”

§ 9202. Limitations on requests for criminal history record information

(a) **INQUIRIES PRIOR TO CONDITIONAL OFFER.**—Except as provided in subsections (b) and (c), an employee of an agency may not request, in oral or written form (including through the Declaration for Federal Employment (Office of Personnel Management Optional Form 306) or any similar successor form, the USAJOBS internet website, or any other electronic means) that an applicant for an appointment to a position in the civil service disclose criminal history record information regarding the applicant before the appointing authority extends a conditional offer to the applicant.

(b) **OTHERWISE REQUIRED BY LAW.**—The prohibition under subsection (a) shall not apply with respect to an applicant for a position in the civil service if consideration of criminal history record information prior to a conditional offer with respect to the position is otherwise required by law.

(c) **EXCEPTION FOR CERTAIN POSITIONS.**—

(1) **IN GENERAL.**—The prohibition under subsection (a) shall not apply with respect to an applicant for an appointment to a position—

(A) that requires a determination of eligibility described in clause (i), (ii), or (iii) of section 9101(b)(1)(A);

(B) as a Federal law enforcement officer (as defined in section 115(c) of title 18); or

(C) identified by the Director of the Office of Personnel Management in the regulations issued under paragraph (2).

(2) **REGULATIONS.**—

(A) **ISSUANCE.**—The Director of the Office of Personnel Management shall issue regulations identifying additional positions with respect to which the prohibition under subsection (a) shall not apply, giving due consideration to positions that involve interaction with minors, access to sensitive information, or managing financial transactions.

(B) **COMPLIANCE WITH CIVIL RIGHTS LAWS.**—The regulations issued under subparagraph (A) shall—

(i) be consistent with, and in no way supersede, restrict, or limit the application of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or other relevant Federal civil rights laws; and

(ii) ensure that all hiring activities conducted pursuant to the regulations are conducted in a manner consistent with relevant Federal civil rights laws.

(Added Pub. L. 116-92, div. A, title XI, § 1122(a), Dec. 20, 2019, 133 Stat. 1606.)

Editorial Notes

REFERENCES IN TEXT

The Civil Rights Act of 1964, referred to in subsec. (c)(2)(B)(i), is Pub. L. 88-352, July 2, 1964, 78 Stat. 241. Title VII of the Act is classified generally to subchapter VI (§ 2000e et seq.) of chapter 21 of Title 42, The